2012 IL App (1st) 112785U

SECOND DIVISION
September 28, 2012

No. 1-11-2785

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MENTAL HEALTH AMERICA OF ILLINOIS, Petitioner, v. THE ILLINOIS DEPARTMENT OF HEALTHCARE AND FAMILY SERVICES, Respondent.	)	Appeal from the Circuit Court of Cook County No. 10 CH 18705 Honorable Mary Anne Mason Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Harris, P.J., and Connors, J., concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court did not err in granting respondent's motion to dismiss petitioner's petition for a writ of *mandamus* where respondent was not subject to the requirements of the Open Meetings Act because it was not a "public body," as that term is defined in the statute.

¶ 2 Petitioner, Mental Health America of Illinois, appeals from an order of the circuit court of Cook County dismissing its petition for a writ of *mandamus* to compel respondent, the Illinois

Department of Healthcare and Family Services, to ensure that the Drug and Therapeutics Committee (Committee) of the Illinois State Medical Society (Medical Society) comply with the Open Meetings Act (5 ILCS 120/1 *et seq.* (West 2010)). On appeal, petitioner contends that the court erred by dismissing its petition because the Committee was subject to the Open Meetings Act's requirements where it was a "public body," as that term is defined therein. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 Petitioner filed an amended petition for a writ of *mandamus* alleging that the Committee was operating in violation of the Open Meetings Act where it had refused to allow petitioner to attend its meetings, failed to adequately notify the public of the time and location of its meetings, and failed to provide the public with written minutes of its meetings. Petitioner asserted that Illinois participated in the federal Medicaid program and that respondent was the state agency responsible for providing healthcare under that program. Respondent maintained a preferred drug list to promote the cost-effective use of pharmaceuticals whereby medications on that list would be available to Medicaid recipients without prior authorization by respondent. In order for a physician to be reimbursed for a medication that was not on the list, the physician was required to obtain prior authorization from respondent by identifying the reason that particular medication was necessary for treatment. In addition, petitioner asserted that Illinois maintained a formulary consistent with the provisions of the federal Social Security Act (42 U.S.C. § 1396r-8(d)(4) (2006)) to limit the medications that were covered by the program.

¶ 5 Petitioner also asserted that respondent was required by the Illinois Administrative Code

(Administrative Code) to consult with "individuals or organizations which possess appropriate expertise in the areas of pharmacology and medicine" in determining which medications would require prior authorization (89 Ill. Adm. Code 140.442(a)(1) (2010)) and consult with a panel from such an organization "to review and make recommendations regarding prior approval" (89 Ill. Adm. Code 140.442(a)(2) (2010)). To satisfy those requirements, respondent contracted with the Medical Society to create the Committee, which it then consulted with to review and make recommendations regarding prior approval. The contract between respondent and the Medical Society assigned to the Committee those duties and functions set forth in the Administrative Code (89 Ill. Adm. Code 140.442(a) (2010)). Respondent accepted nearly all of the Committee's recommendations, and by doing so, determined how a substantial amount of State funds were to be expended. In addition, petitioner asserted that the creation of the Committee satisfied the requirement in the Social Security Act that a formulary be developed by such a committee (42 U.S.C. § 1396r-8(d)(4)(A) (2006)).

¶ 6 Petitioner further asserted that the Committee thus satisfied the definition of a "public body" set forth in the Open Meetings Act and was therefore subject to the statute's requirements. Petitioner requested the court issue a writ of *mandamus* compelling respondent to comply with the Open Meetings Act by notifying the public of the time, date, and location of the Committee's meetings; opening up the Committee's meetings to the public; and making the minutes of the Committee's meetings available to the public.

¶ 7 Petitioner attached a number of documents to its amended petition, including the contract between respondent and the Medical Society. Under the terms of the contract, the Medical

Society was to establish a committee comprised of its member physicians to review pharmaceutical literature and provide respondent with consultation and advice regarding drug coverage decisions in accordance with the Administrative Code (89 Ill. Adm. Code 140.442 (2010)). The Medical Society was to assemble that committee quarterly to review the therapeutic efficacy of drug products proposed for coverage under the Illinois Medical Assistance program, develop recommendations regarding which medications should require prior authorization, and produce a quarterly newsletter. Respondent was to provide the Medical Society with $9,650 in compensation for each quarterly meeting and $12,000 for each newsletter. In addition, the Medical Society was classified in the contract as an independent contractor, and not an agent or employee of, or joint venturer with, the State.

¶ 8 Respondent filed a motion to dismiss petitioner's amended petition pursuant to section 2-619(a)(9) of the Illinois Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2010)) and a supporting memorandum of law. Respondent asserted therein that the Committee was not subject to the requirements of the Open Meetings Act because it was not a "public body" under the statute and that respondent operated a prior authorization program to limit its coverage of medications under the Social Security Act and had not developed a formulary. Petitioner filed a response to respondent's motion, in which it asserted that the Committee was part of respondent's organizational structure and performed advisory, deliberative, and investigative functions for respondent.

¶ 9 The circuit court subsequently entered a written memorandum opinion and order granting respondent's motion to dismiss based on its determination that the Committee was not a "public

body" under the Open Meetings Act. In doing so, the court found that Illinois operated a prior authorization program and that the Committee did not meet the minimum requirements of a formulary under the Social Security Act. The court also found that the Committee was not part of respondent's organizational structure or its subsidiary, noting that its members were appointed by the Medical Society and were not subject to dismissal or control by respondent. Petitioner now appeals from this order.

¶ 10 ANALYSIS

¶ 11 Petitioner contends that the circuit court erred in dismissing its amended petition for a writ of *mandamus* because the Committee was subject to the requirements of the Open Meetings Act where it met the definition of a "public body" under that statute. *Mandamus* is a remedy to enforce, as a matter of right, the performance of an official duty by a public officer who has no discretion in the performance of that duty. *Noyola v. Board of Education of the City of Chicago*, 179 Ill. 2d 121, 133 (1997). "To be entitled to a writ of *mandamus*, a party must establish a clear right to relief, a clear duty of the public official to act, and a clear authority in the public official to comply with the writ." *Burris v. White*, 232 Ill. 2d 1, 7 (2009). A motion to dismiss brought under section 2-619(a)(9) admits the legal sufficiency of the complaint and asserts an affirmative matter outside the pleading that avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West 2010); *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). When ruling on such a motion, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party, and we will review the circuit court's ruling on such a motion *de novo*. *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d

262, 267 (2010).

¶ 12 The Open Meetings Act ensures "that the actions of public bodies be taken openly and that their deliberations be conducted openly" by providing that citizens "be given advance notice of and the right to attend all meetings at which any business of a public body is discussed or acted upon in any way." 5 ILCS 120/1 (West 2010). The term "public body" is defined as including "all legislative, executive, administrative or advisory bodies of the State" and any of their subsidiaries. 5 ILCS 120/1.02 (West 2010). In determining whether an entity is a "public body" under the Open Meetings Act, a court should consider:

> "who appoints the members of the entity, the formality of their appointment, and whether they are paid for their tenure; the entity's assigned duties, including duties reflected in the entity's bylaws or authorizing statute; whether its role is solely advisory or whether it also has a deliberative or investigative function; whether the entity is subject to government control or otherwise accountable to any public body; whether the group has a budget; its place within the larger organization or institution of which it is a part; and the impact of decisions or recommendations that the group makes." *University Professionals of Illinois, Local 4100 of the Illinois Federation of Teachers v. Stukel*, 344 Ill. App. 3d 856, 865 (2003) (citing *Board of Regents of the Regency University System v. Reynard*, 292 Ill. App. 3d 968, 974 (1997); *Pope v. Parkinson*, 48 Ill. App. 3d 797, 799-800; *People ex rel. Cooper v. Carlson*, 28 Ill. App. 3d 569, 571-72 (1975)).

Petitioner asserts that all the factors listed above weigh in favor of determining that the Committee is a "public body" under the Open Meetings Act.

¶ 13 The most important factor in determining whether an entity is a "public body" is the entity's place within the organizational structure of the larger institution of which it is a part. *Stukel*, 344 Ill. App. 3d at 866; *Reynard*, 292 Ill. App. 3d at 977. Petitioner maintains that the Committee holds a significant position within respondent's organizational structure because its creation was required by the Administrative Code and the Social Security Act. Respondent asserts that the Committee is not part of its organizational structure where it was created by and is a part of the Medical Society, which is a private professional organization.

¶ 14 In this case, the allegations set forth in petitioner's petition and the terms of the contract attached thereto show that the Committee was created by the Medical Society and was comprised of its members and that the Medical Society operated as an independent contractor under its contract with respondent. Thus, petitioner's allegations and supporting documents do not show that the Committee was a part of the organizational structure of respondent in any way, but rather that it was entirely within the organizational structure of the Medical Society.

¶ 15 Petitioner, however, asserts that the Committee holds a significant position within respondent's organizational structure because its creation was required by the Administrative Code. In doing so, petitioner cites to *Reynard*, 292 Ill. App. 3d at 977-78, in which this court held that the entity at issue was a "public body" where it was created by a State organization pursuant to its own bylaws. In this case, the Administrative Code requires only that respondent consult with the appropriate groups and panels in determining which medications will require

prior authorization, and does not require respondent to create any entities. 89 Ill. Adm. Code 140.442(a)(1), (a)(2) (2010). Moreover, unlike *Reynard*, where the entity at issue was created by a State organization, here the Committee was not part of respondent's organizational structure in any way where it was created by and is a part of the Medical Society, a private organization.

¶ 16 Petitioner further asserts that respondent was required to create the Committee by the Social Security Act because Illinois maintains a formulary. A state may place limitations on its coverage of drugs under the Social Security Act by establishing a formulary or operating a prior authorization program. 42 U.S.C. § 1396r-8(d)(4), (d)(5) (2006). For a formulary to comply with the requirements of the Social Security Act, it must have been developed "by a committee consisting of physicians, pharmacists, and other appropriate individuals appointed by the Governor of the State" or, at the option of the State, its drug use review board established under the statute. 42 U.S.C. § 1396r-8(d)(4)(A) (2006). As the circuit court noted, the members of the Committee have not been appointed by the Governor or respondent and the Committee does not act as a drug review board where it does not make final determinations regarding drug coverage, but merely provides recommendations to respondent. Thus, Illinois limits drug coverage under the Social Security Act by operating a prior authorization program, rather than by establishing a formulary, and respondent therefore was not required to create the Committee by that statute.

¶ 17 We therefore determine that the Committee is not a part of respondent's organizational structure in any way where it was created by and is a part of the Medical Society and neither the Administrative Code nor the Social Security Act mandated its creation. As such, this most important factor weighs heavily in favor of concluding that the Committee is not a "public body,"

and we now turn our consideration to the remaining factors in our inquiry.

¶ 18 Petitioner maintains that respondent exercises significant control over the appointment of the Committee's members through its contract with the Medical Society, which requires that the Committee be comprised of physicians from the Medical Society who are licensed to practice all branches of medicine and who represent multiple specialties, as required by the Administrative Code. However, under the terms of the contract between respondent and the Medical Society, the task of establishing the Committee was given to the Medical Society. In addition, the Administrative Code merely requires that respondent consult with a panel of an organization that is composed of physicians, pharmacologists, or both, and has an expertise in pharmacology and medicine, and delegates the responsibility of selecting the members of the panel to that organization. 89 Ill. Adm. Code 140.442(a)(1), (a)(2) (2010). Thus, the power to appoint members of the Committee rests with the Medical Society, and not respondent, and the contract and Administrative Code impose only the most basic requirements on the composition of the Committee by requiring the Medical Society to appoint practicing physicians who represent a wide variety of medical fields. As such, respondent's lack of authority over appointments to the Committee indicates that the Committee is not a "public body" under the Open Meetings Act. *Pope*, 48 Ill. App. 3d at 799.

¶ 19 Petitioner also maintains that respondent assigns duties to the Committee through its contract with the Medical Society and the Administrative Code. In this case, respondent assigns some duties to the Committee through its contract with the Medical Society where the contract requires the Committee assemble quarterly to review the therapeutic efficacy of drug products

proposed for coverage, develop recommendations regarding which medications should require prior authorization, and produce a quarterly newsletter. Thus, while this factor weighs in favor of determining that the Committee is a "public body," the mere delegation of some duties to a private party does not render an entity a "public body" under the Open Meetings Act (*Rockford Newspapers, Inc. v. Northern Illinois Council on Alcoholism and Drug Dependence*, 64 Ill. App. 3d 94, 97 (1978)).

¶ 20 Petitioner also maintains that the Committee performs deliberative, investigative, and advisory functions for respondent where it reviews new pharmaceutical products and makes prior authorization recommendations, considers manufacturer appeals of previous recommendations, and reviews materials submitted by drug manufacturers and respondent. While the majority of these functions appear to be advisory in that the Committee advises respondent on the basis of the materials provided to it by respondent and drug manufacturers, the Committee may perform some deliberative function as well, and the Open Meetings Act explicitly includes advisory bodies of the State in its definition of a "public body" anyway. Thus, the application of this factor does not seem to weigh in favor of either party, and if it does favor petitioner, it does so only slightly.

¶ 21 Petitioner also maintains that respondent exerts significant control over the Committee through its contract with the Medical Society and the requirements of the Administrative Code and that the Committee therefore is accountable to it. In *Hopf v. Topcorp, Inc.*, 256 Ill. App. 3d 887, 894 (1993), this court determined that an entity was only under the influence, rather than the control, of government bodies where those bodies owned half of the outstanding shares of the

entity and appointed half its directors. In this case, respondent has a lesser amount of control than the government bodies in *Hopf* where it requires the Committee, through its contract with the Medical Society, to meet quarterly, review drug products, develop recommendations, and produce a newsletter. Thus, respondent only has control over the general manner in which the Committee's services will be carried out and has no way of controlling the Committee's internal operations or the substance of its recommendations, and the Committee is therefore accountable to respondent only to the limited degree that it must comply with these very general procedural provisions. As such, this factor weighs in favor of determining that the Committee is not a "public body."

¶ 22 Petitioner also maintains that the Committee has a budget funded by respondent. In this case, respondent was required to provide the Medical Society with $9,650 in compensation for each of the Committee's quarterly meetings and $12,000 for each newsletter it provided under the terms of their contract. Thus, although this factor weighs in favor of determining that the Committee is a "public body," public funding alone will not render an entity subject to the Open Meetings Act (*Rockford Newspapers*, 64 Ill. App. 3d at 96)).

¶ 23 Petitioner further maintains that the Committee's recommendations have a significant impact on respondent and the citizens of Illinois where the task of designating medications as requiring prior authorization affects a sizeable portion of the population and respondent accepts nearly all of the Committee's recommendations. In this case, the Administrative Code makes clear that the Committee's recommendations "shall be non-binding upon [respondent] and can in no way bind or otherwise limit [respondent's] right to determine in its sole discretion those drugs

which shall be available without prior approval." 89 Ill. Adm. Code 140.442(a)(2) (2010). In addition, although petitioner asserts that respondent has accepted nearly all of the Committee's recommendations, the only fact it alleged in its petition to support that conclusion is that on September 15, 2010, respondent accepted 77% of the Committee's recommendations where it accepted 10 of the Committee's 13 recommendations. Thus, even when interpreting that fact in the light most favorable to petitioner to show that respondent consistently accepted a similar percentage of the Committee's recommendations, that fact shows that respondent actually rejects a reasonable proportion of the Committee's recommendations where it does so 23% of the time. It only makes sense that respondent would continue to solicit recommendations from a panel that oftentimes provides recommendations it subsequently determines are sound. As such, this factor weighs in favor of determining that the Committee is a "public body."

¶ 24 Thus, the most important factor in determining whether an entity is a "public body," the entity's place within the organizational structure of the larger institution of which it is a part, weighs heavily in favor of the conclusion that the Committee is not a "public body" where the Committee is not within respondent's organizational structure at all. As to the other factors, some weigh in favor of determining that the Committee is a "public body" while other factors weigh in favor of determining that it is not. For example, respondent's assignment of duties to the Committee and the Committee's budget indicate that the Committee is a "public body," while respondent's lack of control over appointment of the Committee members and the Committee in general and the non-binding nature of the Committee's recommendations indicate that it is not. As such, we determine that the Committee is not a "public body" under the Open Meetings Act

and therefore conclude that the court did not err in granting respondent's motion to dismiss the petition for a writ of *mandamus*.

¶ 25 CONCLUSION

¶ 26 Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.